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Supreme Court, U.S.
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In The

Supreme Court of the United States

JONATHAN D. DREW,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

JACK B. ZIMMERMANN
Counsel of Record
TERRI R.Z. JACOBS
ZIMMERMANN & LAVINE, P.C.
770 South Post Oak Lane,
Suite 620
Houston, Texas 77056
713-552-0300
713-552-0746 (Fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1) Whether Mr. Drew was denied his Sixth Amendment right to confront witnesses against him when he was unable to cross-examine the key State witness about the probation status of the witness.

2) Whether Mr. Drew was denied his Fourteenth Amendment right to Due Process when the trial court did not instruct the jury on every element of the offense of conviction, specifically, that the jury must be convinced that Mr. Drew intended to commit an underlying offense beyond a reasonable doubt in order to convict him of felony murder.

3) Whether Mr. Drew was denied his Fourteenth Amendment rights to Due Process and Equal Protection because the jury was not required to unanimously agree on every element of the offense of conviction.

4) Whether Mr. Drew was denied his Sixth Amendment rights to effective assistance of counsel and to an impartial jury when the trial court denied his request to reopen voir dire after an eight-week recess between jury selection and opening statements.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Mr. Jonathan Drew respectfully requests that the Honorable Justices of the Supreme Court grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourteenth District of Texas rendered on February 14, 2002. In support of his request, Mr. Drew sets forth the following:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth District of Texas which is the subject of this Petition is *Drew v. State*, 76 S.W.3d 436 (Tex. App. – Houston [14th Dist.] 2002, pet. ref'd), and is set forth as Appendix A. The Texas Court of Criminal Appeals refused the Petition for Discretionary Review on June 26, 2002 and is set forth as Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Court of Appeals for the Fourteenth District of Texas affirming Mr. Drew's conviction was entered on February 14, 2002. Jurisdiction to review the court of appeals' opinion by writ of certiorari is conferred by Title 28 of the United States Code, § 1257(a) (2002).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the case are as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. Const. amend. VI.

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Basis for Federal Review in the First Instance.

Mr. Drew was convicted by a state district court and his case has proceeded through the appellate courts established to hear appeals of state convictions.

B. Procedural History.

Mr. Drew was indicted on January 21, 1999 for the capital murder of Tina Flood. The indictment alleged an intentional killing in the course of committing aggravated

sexual assault or kidnapping. A jury was selected from July 19, 1999 until August 11, 1999 in the 183rd District Court of Harris County, Texas. The court recessed until October 4, 1999, at which time the trial was held until October 13, 1999. The jury returned a verdict of guilty of felony murder, and sentenced Mr. Drew to confinement for life and a $10,000.00 fine. Mr. Drew timely filed a notice of appeal on October 21, 1999. In a published opinion, the Court of Appeals for the Fourteenth District of Texas affirmed the conviction. Mr. Drew timely filed a Petition for Discretionary Review on March 15, 2002. The Texas Court of Criminal Appeals refused his Petition for Discretionary Review on June 26, 2002. Mr. Drew now timely files his Petition for Writ of Certiorari.

C. Material Facts.

Mr. Drew was invited to a party at a bar in Seabrook, Texas. 25 R. 22.[1] While at the party, he met Tina Flood, a 23-year-old woman. 24 R. 38-39. Ms. Flood had given 20-year-old Justin Chapman, who lived with her at her grandparents' house, a ride to the party. 24 R. 60-61, 64; 25 R. 26-27, 57-58. Mr. Drew and Ms. Flood became somewhat of a "couple" during the course of the evening at the bar, and were kissing and touching each other in plain view of the other people present. 24 R. 40-42. Most of the friends at the party became extremely intoxicated,

[1] The Clerk's Record is contained in one volume and is cited as "C. Page Number." For example, "C. 1." The Court Reporter's Record is contained in 35 volumes, and is cited as "Volume Number R. Page Number." For example, "2 R. 1." (Note that there are two volumes labeled Volume 2.)

including Ms. Flood and Justin Chapman. 24 R. 24-65, 70; 25 R. 19.

Several guests at the party worked at the Holiday Inn. Prior to the party, Ms. Flood and Mr. Chapman had reserved a room at a different Holiday Inn that was located near the bar. 25 R. 36. At approximately 2:15 a.m., the group of friends at the party left this bar and went to continue drinking at the nearby Holiday Inn. 25 R. 36. Ms. Flood and Mr. Chapman rode to the Holiday Inn with other friends, leaving Ms. Flood's vehicle in the bar's parking lot. 25 R. 41. Mr. Drew followed. 25 R. 43. However, when they arrived, Mr. Chapman realized that he had forgotten his Holiday Inn employee card that entitled him to a discount rate on the reserved room. 25 R. 44. Mr. Drew was asked to take Ms. Flood and Mr. Chapman in his truck back to the parking lot of the bar so that Mr. Chapman could retrieve his belongings from Ms. Flood's car. 25 R. 46-47. After Mr. Chapman got out of Mr. Drew's truck in the parking lot, Mr. Drew and Ms. Flood left together. 25 R. 48.

Justin Chapman was the key State witness. He testified that after he got out of Mr. Drew's truck in the bar's parking lot, Ms. Flood attempted to get out but Mr. Drew drove away. 25 R. 48. This was the only evidence arguably supporting the kidnapping allegation; no other witness testified that Mr. Drew abducted or restrained Ms. Flood in any way. In fact, the uncontroverted evidence indicated that Ms. Flood and Mr. Drew were enjoying each other's company; they were kissing each other in the bar in plain view of all of the partygoers, even after some of Ms. Flood's friends teased her about it. 24 R. 41-42; 25 R. 12-13, 63.

Defense counsel filed pretrial motions requesting the criminal backgrounds of all State witnesses, including pending charges, and for information showing bias of any state witness. C. 45, 50. The judge granted both motions. C. 45, 50. The State disclosed no information concerning Mr. Chapman prior to the trial.

At the time of his testimony, Mr. Chapman was on probation for a conviction for driving while intoxicated. 33 R. 4. Although his case was initially handled by a different county, his probation was supervised by Harris County, Texas, the same county that prosecuted the instant case. This information was contained in the county computer system and other records in the State's possession and readily available to the prosecutors. *See* 33 R. 8-9. Further, evidence indicated that Mr. Chapman had violated the conditions of his probation and that the State was aware of this fact. Specifically, Mr. Chapman had violated the conditions of his probation by consuming alcohol. 25 R. 94.

The State did not disclose Mr. Chapman's probationary status to the defense. Defense counsel became aware of the probation status after the State had rested during the punishment phase of trial. 33 R. 4. Therefore, he was unable to cross-examine Mr. Chapman about it during the guilt-innocence phase. Defense counsel moved for a mistrial. 33 R. 7. The judge denied the motion. 33 R. 10.

Mr. Drew was charged with capital murder, with both aggravated sexual assault and kidnapping alleged as the felony committed in the course of the intentional murder. C. 7. The capital murder jury instructions contained the culpable mental states of intentionally or knowingly. C. 168-71. Lesser included offenses were also contained in

the charge. The State requested a charge on felony murder, which the court gave, over defense objection, in the form proposed by the State. No culpable mental state at all was included in either the definition or application sections of the felony murder jury instruction. C. 171-72. Defense counsel objected to the felony murder instruction: "Well, they have to prove that he intentionally committed the underlying felony." 28 R. 10. Although the State recognized that a culpable mental state was necessary, saying, "[f]elony murder – the essence of felony murder is that the intent element is in the commission of the felony," the defense objection was overruled. 28 R. 8, 12.

The trial court also overruled the defense objection to the failure to instruct the jury that it must unanimously agree on the underlying offense to felony murder of either aggravated sexual assault or kidnapping. 27 R. 130-32; 28 R. 13. The jury was charged, therefore, that it could find Mr. Drew guilty of felony murder if it found that he committed or attempted to commit either underlying felony, and committed an act clearly dangerous to human life resulting in the death of Ms. Flood. The result could be a non-unanimous verdict.

Because of a great deal of pretrial publicity adverse to Mr. Drew, defense counsel filed a motion for a change of venue and introduced many exhibits, including videotapes of television coverage and newspaper clippings. C. 66-67; M.C.V. 1, 2, 3, 3a, 4, 4a, 5, 6, 7.[2] Jury selection took place from July 19, 1999 until August 11, 1999. C. 148, 219-49.

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[2] Exhibits admitted on the motions for change of venue are cited as "M.C.V. Exhibit Number." For example, "M.C.V. 1."

The defense counsel used all but one of the peremptory strikes. C. 129. The court then recessed for approximately eight weeks, until October 4, 1999. C. 250. In the interim, in addition to publicity about the instant case, there was negative publicity concerning the disappearance of Jessica Cain, another young woman from the same area of the state as Ms. Flood. M.C.V. 25a, 26a. In the media, Mr. Drew was linked to Ms. Cain's disappearance. M.C.V. 25a, 26a. One of the jurors who sat on Mr. Drew's case had indicated familiarity with the Cain case, although not by name. 17 R. 74-75.

The defense made a written motion to reopen voir dire, and also made an oral request to the judge before opening statements based on the possibility that one of the jurors may have been tainted with some experience that would prejudice the defendant, and a flurry of media coverage that September that purportedly linked Mr. Drew to the disappearance of another individual. C. 148-49; 23 R. 24. The judge denied both requests, and only asked the jury one question before beginning the trial: whether any of them had served on a jury during the break. 23 R. 35-36.

The jury convicted Mr. Drew of felony murder and sentenced him to life imprisonment. The Court of Appeals for the Fourteenth District of Texas affirmed his conviction and the Texas Court of Criminal Appeals refused his Petition for Discretionary Review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

REASON I

THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A RELEVANT DECISION OF THIS COURT, SPECIFICALLY, *DELAWARE V. VAN ARSDALL*, 475 U.S. 673 (1986).

A. The Confrontation Clause Requires Proper Cross-Examination of Each Witness.

When one person accuses another of a crime the accusation is presumptively suspect and because of this, "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999). The Court has set forth the standard by which appellate courts should evaluate Confrontation Clause challenges:

> We think that *a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination* designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (emphasis added).

The court of appeals in the case at bar found no error despite Mr. Drew's inability to conduct a proper cross-examination of Justin Chapman regarding the fact that Mr. Chapman was on probation and had violated the conditions of his probation and thus, had a motive to curry favor with the State. *Drew v. State*, *supra*, 76 S.W.3d at 450. The only justification for this finding apparent from the court's opinion is its determination that "Chapman's probationary status was not material." *Id.* This analysis is in direct conflict with this Court's language:

> The State somewhat tentatively suggests that a defendant should have to show "outcome determinative" prejudice in order to state a violation of the Confrontation Clause . . . We disagree. While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, . . . *the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.*

Delaware v. Van Arsdall, *supra*, at 679-80 (citation omitted) (emphasis added).

B. Mr. Drew was Prohibited From Engaging in Proper Cross-Examination.

The Court has defined the scope of proper cross-examination: "[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but [also] . . . allowed to impeach, i.e., discredit the witness." *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (quoting *Davis v. Alaska*, *supra*, at 316). Further, "[c]onfrontation means more than being allowed to confront the witness physically." *Id.* (quoting *Davis v. Alaska*,

supra, at 315). One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. *Davis v. Alaska*, *supra*, at 316. By doing so, "the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely . . . to be truthful in his testimony." *Id.* Thus, the introduction of a prior criminal conviction is a "general attack on the credibility of the witness." *Id.*

Mr. Chapman's account of the events on the night are suspect based on his intoxication and jealousy of Ms. Flood's involvement with Mr. Drew. If the State had elected to revoke Chapman's probation, he faced jail time, which can clearly motivate a witness to repeat a false statement given at the scene. This Court has stated that the exposure of a witness' motivation in testifying is a "proper and important function of the constitutionally protected right of cross-examination." *Id.* His probation status was relevant to showing a motive for him to testify in accordance with his prior statements, despite their unreliability, to avoid problems with prosecutors in the county in which his probation was supervised. The right to cross-examination is implicit in the constitutional right of confrontation and it is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). "[I]ts denial . . . calls into question the ultimate 'integrity of the fact-finding process.'" *Id.* Because Mr. Drew was not able to inquire about Mr. Chapman's probation status, he was denied his federal Sixth Amendment constitutional right of confrontation.

C. The Lower Court Applied the Wrong Legal Test.

The court of appeals determined that "Chapman's probationary status was not material, i.e. created a probability sufficient to undermine confidence in the jury's verdict." *Drew v. State*, *supra*, 76 S.W.3d at 450. As the Court clearly set forth above, this is not the appropriate inquiry to make when determining whether the Confrontation Clause was violated. *Delaware v. Van Arsdall*, *supra*, 475 U.S. at 679-80. Instead, the court of appeals should have determined whether the probation status was proper cross-examination.

The importance of Mr. Chapman's testimony to the State's case highlights the severity of the error that occurred due to Mr. Drew's inability to cross-examine him. Had Mr. Drew been able to cross-examine Mr. Chapman about his probation status and motive to curry favor with the state, he may have been able to discredit him. This is important because there was *no other evidence of kidnapping* introduced at trial. The consequences of this error are also relevant to Reason III, *infra*, because without knowing which jurors, if any, found that the State proved every element of kidnapping, there is no way to ensure that Mr. Drew was convicted by a unanimous jury as guaranteed to him by the Texas Constitution and the Due Process and Equal Protection Clauses of the United States Constitution.

The court of appeals applied the wrong legal test regarding whether Mr. Drew's right to cross-examine was violated and reached its decision in conflict with decisions of this Court. Therefore, the Court should grant the Petition for Writ of Certiorari.

REASON II

THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A RELEVANT DECISION OF THIS COURT, SPECIFICALLY, *FRANCIS V. FRANKLIN*, 471 U.S. 307 (1985).

A. The State Must Prove Intent to Commit the Underlying Felony to Prove Felony Murder.

For over a quarter of a century, it has been clear that the State has the burden of proving each and every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). In a Texas felony murder prosecution, there is no culpable mental state directly applicable to the killing; instead, the charged underlying felony provides the relevant intent. *Rodriguez v. State*, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977). If the State fails to prove such intent, the conviction cannot stand. *Id.* at 29. *See generally Hopkins v. Reeves*, 524 U.S. 88 (1998). A charge of kidnapping or rape clearly defines a particular kind of prohibited intent, and "a particular intent is more often than not the sine qua non of a violation of a criminal law." *Apprendi v. New Jersey*, 530 U.S. 466, 493 n. 18 (2000). "[I]n order for a jury trial of a crime to be proper, *all* elements of the crime must be proved to the jury." *Id.* at 500 (Thomas, J., concurring) (emphasis added).

B. The Jury Must be Instructed on Every Element of the Offense.

Of particular relevance to the instant case, where Mr. Drew complains that the jury was not properly instructed

on the critical element of intent, the Court has held that "the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution." *Francis v. Franklin*, 471 U.S. 307, 326 (1985). The jury instructions *on felony murder* that the jury received in the case at bar contained *no* requirement that the jury find that Mr. Drew intended to commit any offense. Neither the definition paragraphs nor the application paragraphs of the felony murder instruction contain the requirement that the jury find that the underlying felony was committed intentionally or knowingly. Although the underlying offenses were properly charged later in the instructions, there was no reference to these instructions when the court charged on felony murder. This effectively relieved the State from its burden on the critical issue of the offense of conviction, and violated Due Process.

The Court has held that, "it has been settled law since *Stromberg v. California*, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Francis v. Franklin*, *supra*, at 324. In this case, the jury relied on an instruction that omitted the critical element of intent.

Because the opinion below conflicts with a relevant decision of this Court, the Court should grant the Petition for Writ of Certiorari.

REASON III

THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, SPECIFICALLY, *MORGAN V. ILLINOIS*, 504 U.S. 719 (1992) AND *EVITTS V. LUCEY*, 469 U.S. 387 (1985).

A. Mr. Drew Was Entitled to a Unanimous Jury.

The State of Texas clearly requires a unanimous verdict of guilt in cases such as the case at bar:

> *Not less than twelve jurors can render and return a verdict in a felony case.* It must be concurred in by each juror and signed by the foreman.

Tex. Code Crim. Proc. art. 36.29; *see also Molandes v. State*, 571 S.W.2d 3, 4 (Tex. Crim. App. 1978) (stating that defendants in felony criminal cases have right to a unanimous verdict of guilt under Tex. Const. art. V, § 13).

It is emphasized that the State must prove as an element of the offense of felony murder the intent to commit the underlying felony. *Rodriguez v. State*, *supra*, 548 S.W.2d at 28-29. There is no right to a special verdict form in Texas. Tex. Code Crim. Proc. art. 37.07(a). Therefore, because of the deficient jury instructions, it is not clear in this case which element, if any, the jury found: no intent at all on either underlying felony, or the intent to kidnap, or the intent to commit sexual assault.

B. The Lack of a Unanimous Verdict in This Case Violates Due Process and Equal Protection.

1. Generally.

Because Texas law provides that verdicts shall be unanimous, Mr. Drew's rights were violated when the jury in his case was permitted to return a general verdict and there were two underlying offenses alleged in the indictment. "'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal Protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985).

2. Due Process.

It is recognized that this Court has held that there is no federal constitutional right to a unanimous jury verdict. *Apodaca v. Oregon*, 406 U.S. 404 (1972). However, the state of Texas has guaranteed its citizens the right to unanimous twelve-member jury verdicts in felony cases. Tex. Code Crim. Proc. art. 36.29. This situation is analogous to that presented in *Morgan v. Illinois*, in which this Court found:

> [N]o State is constitutionally required by the Sixth Amendment or otherwise to provide for jury determination of whether the death penalty shall be imposed on a capital defendant. Illinois has chosen, however, to delegate to the jury this task in the penalty phase of capital trials in addition to its duty to determine guilt or innocence of the underlying crime. The issue, therefore, is whether petitioner is entitled to relief under the

> Due Process Clause of the Fourteenth Amendment. We conclude that he is. . . .

Morgan v. Illinois, 504 U.S. 719, 726 (1992) (citations omitted). It is also similar to the right to counsel on appeal. It is clear there is no federal constitutional right to counsel on appeal. However, when a state provides for an appeal as a matter of right, that right includes the right to the effective assistance of counsel:

> Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

Evitts v. Lucey, *supra*, at 393 (citations omitted). The Court then discussed other examples applying this principle:

> For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause.

Id. at 401 (citations omitted). The Court concluded, "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless

act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.*

3. Equal Protection.

The jury in the instant case was permitted to convict with the possibility existing that some jurors found no intent at all for an underlying felony, some jurors found that the State proved the intent of one underlying felony beyond a reasonable doubt, and other jurors found that the State proved the intent of the other underlying felony beyond a reasonable doubt. This put Mr. Drew in a different, and disadvantaged, position, as compared with other defendants in the State of Texas who are accused and tried for any offense, including the offense of felony murder. Other defendants are entitled to a unanimous verdict; Mr. Drew did not receive one. Justice Marshall observed that "an essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 467 (1989) (Marshall, J., dissenting).

This Court has discussed the importance of allowing no discrimination between defendants in similar situations. "Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with a crime must, so far as the law is concerned 'stand on an equality before the bar of justice in every American Court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (citations omitted). Mr. Drew was deprived of the chance to stand on this equality when he did not get a unanimous verdict that Texas law provides for all citizens of Texas, in

violation of the Fourteenth Amendment to the United States Constitution.

C. The Court's Analysis in a Similar Case Governs the Instant Case.

Mr. Drew was convicted of felony murder. The court of appeals relied on *Kitchens v. State*, 823 S.W.2d 256, 257-58 (Tex. Crim. App. 1991), which held that the underlying felonies to *capital* murder are only means of committing the offense rather than elements of the offense. *Drew v. State*, *supra*, 76 S.W.3d at 456-57. However, in a felony murder prosecution, the underlying felony provides the required *element* of a culpable mental state – it does not merely describe a means of committing the offense.

The case at bar is similar to *Richardson v. United States*, 526 U.S. 813 (1999). *Kitchens* does not govern this issue and the court of appeals committed legal error by using this test. The court of appeals should have applied the *Richardson* analysis.

Richardson involved a statutory crime that made conduct a separate serious criminal offense only if certain underlying offenses were proved. *Id.* at 815. In that case, the prosecution made the exact same argument adopted by the court of appeals in the case at bar – that the underlying offenses provided only the "means" of committing the offense. *Id.* at 820. The Court in *Richardson* held that the failure to require a unanimous verdict on the underlying offenses there would aggravate the dangers of unfairness, increasing the likelihood that it would permit the jury to avoid discussion of the specific factual details of each underlying offense. *Id.* at 819. The Court described this as having the potential to "cover up wide disagreement

among jurors about just what the defendant did, or did not, do." *Id.*

In the instant case, two separate underlying offenses were alleged to support the felony murder allegation, each with two different methods of committing them charged. There is a great deal of difference between the mens rea in aggravated sexual assault and the mens rea in kidnapping. It is the culpable mental state for one or the other of these offenses that is transferred to the killing, making it a felony murder. The Texas Court of Criminal Appeals has held that "[t]he underlying felony has to be an act separate and apart from the assault resulting in death." *Johnson v. State*, 4 S.W.3d 254, 256 (Tex. Crim. App. 1999). The jury must unanimously agree on what Mr. Drew did, or did not, do. Did he intend to commit aggravated sexual assault, or did he intend to commit kidnapping? A jury cannot return a "split decision," some finding one and some finding the other.

D. Conclusion.

Mr. Drew was denied his state-law guarantee of a unanimous verdict. The court of appeals ignored Texas law and the holding in *Richardson* and sanctioned the jury's ability to convict without all twelve jurors being convinced beyond a reasonable doubt as to which underlying felony was committed. In addition to the Due Process and Equal Protection violations discussed above, this error denied Mr. Drew his right to have every element proven beyond a reasonable doubt. *In re Winship*, *supra*, 397 U.S. at 362.

Because the opinion below conflicts with relevant decisions of this Court, the Court should grant the Petition for Writ of Certiorari.

REASON IV

THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AFFIRMED THE TRIAL COURT'S DEPRIVATION OF MR. DREW's SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY CAUSING ITS DECISION TO CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, SPECIFICALLY, *MORGAN V. ILLINOIS*, 504 U.S. 719 (1992) AND *NEBRASKA PRESS ASSOC. V. STUART*, 427 U.S. 539 (1976).

The court of appeals held that the trial court did not abuse its discretion when it failed to allow further voir dire after the two month break between jury selection and opening statements. *Drew v. State*, *supra*, 76 S.W.3d at 461. The court of appeals failed to address Mr. Drew's argument that this restriction on voir dire violated his Sixth Amendment rights.

A. Right to Effective Assistance of Counsel.

The right under the Sixth Amendment to effective assistance of counsel in jury selection encompasses counsel's ability to intelligently exercise juror challenges:

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire

> impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (citations omitted); *see also Morgan v. Illinois*, *supra*, 504 U.S. at 729-30.

Mr. Drew was deprived of the opportunity to adequately question the potential jurors in this case, and thus deprived of the effective assistance of counsel, because his counsel were deprived of essential knowledge with which to exercise a challenge for cause, or to use their remaining peremptory strike.

1. Media coverage.

During that interim, there was a great deal of media coverage of the instant case involving Tina Flood. There was also tremendous news reporting concerning another case involving the disappearance of Jessica Cain, which took place in the same general area (Seabrook, Clear Lake, League City, La Marque, Texas). Some media coverage indicated Mr. Drew was a suspect in the Cain investigation. While the jury had been instructed to avoid publicity about the instant case, there was no admonishment about avoiding exposure to the case involving Jessica Cain. At least one juror who rendered the verdict, Juror Number 10, Sandra Chumbley, apparently had been following the Cain investigation as she indicated during voir dire on August 4, 1999. She recalled the case of the missing girl along "45 South," which mirrored the facts of the Cain investigation. (17 R. 74-75). She could not have been referring to the case at bar, because Ms. Flood was not missing. The pretrial publicity after voir dire about Ms.

Cain's case that linked Mr. Drew to the Cain disappearance could have affected this juror's ability to fairly and impartially consider the evidence in Mr. Drew's case, thus providing a ground for a challenge for cause or to exercise Mr. Drew's final peremptory challenge.

This Court has stated: "Particularly in case of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 602 (1976); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (stating "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed."). Mr. Drew was deprived of such latitude.

2. Personal life experiences.

Although the judge asked one question of the panel after they re-convened – whether they had served on a jury during the interim – she refused to ask or allow defense counsel to ask the panel whether they had experienced any life events during the interim that would affect their ability to serve on the jury. (24 R. 6-7). This was error because had one of the panel members or a family member or a close friend been sexually assaulted or started a new job with a law enforcement agency, for example, this subject would be proper for voir dire.

Defense counsel were required to conduct voir dire and exercise challenges for cause and peremptory strikes before the eight-week break, so it was impossible to

question the jurors concerning exposure to media coverage or life experiences which they had yet to experience because they had not yet taken place.

Applying principles of federal constitutional law, the United States Court of Appeals for the Fifth Circuit has directly addressed this point. Finding reversible error under circumstances similar to those in the instant case, that court stated:

> Events occurring during such a significant delay [forty-nine days] may have substantial effects upon the personality or preconceptions of the jury and seriously dilute the effectiveness of the prior exercise of peremptory challenges . . . Additionally, the lives of the individual jurors may be affected in a multitude of ways during a forty-nine day delay. For example, narcotics, violence, or other unlawful activity may touch the lives of the jurors, their families, or friends. A juror may be a victim or a witness of crime or become associated with a victim or witness during this period. We only cite specific examples to illustrate that a person's beliefs and prejudices can drastically change during a lengthy expiration of time. We cite experience and human nature as authority.
>
> We hold today that in order to assure the effective exercise of peremptory challenges and to assure that challenges for cause are available when the parties are so entitled, the trial court has an obligation, after any significant delay between the selection of the jury and commencement of trial, to conduct supplemental voir dire to determine whether any events have transpired during the delay which may have caused the formation of preconceptions concerning the case

> at hand, or of which the attorneys would simply be entitled to be advised in order to effectively exercise peremptory challenges. Additional peremptory challenges or challenges for cause should be afforded to the parties if permissible.

United States v. Price, 573 F.2d 356, 363-64 (5th Cir. 1978); *United States v. Capua*, 656 F.2d 1033, 1036 (5th Cir. 1981) ("A thirty-nine day delay between selection and trial is a 'significant delay' for purposes of the Price requirement of supplemental voir dire.").

In the case at bar, it would have taken less than ten minutes for the court to have asked, "Has anyone had anything happen in your personal life since you were selected as a juror that should be brought to the attention of the court or the lawyers?" or "Has the answer changed to any of the questions you were asked when you were here in July or August?" The trial court's failure to do so deprived Mr. Drew of his Sixth Amendment rights.

B. Right to an Impartial Jury.

The Court has stated that, "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Morgan v. Illinois*, *supra*, at 727 (citations omitted). This right to an adequate voir dire is part of the guarantee of the right to an impartial jury. *Id.* at 729-30. Voir dire provides a means of discovering bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994). The Court has recognized that the "peremptory challenge is part of

this country's common-law heritage." *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000). In addition, the Court has stressed that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Davis v. Alaska*, *supra*, 473 U.S. at 914 (citing *Pointer v. United States*, 151 U.S. 396 (1894)).

Because this Court has recognized the threat to this constitutional right to an impartial jury caused by pretrial publicity, in the case at bar counsel should have been permitted to question the jurors about this issue, especially since the publicity in the interim linked Mr. Drew to the other highly inflammatory Cain case. The long period of time between voir dire and trial also made it likely that events occurred in the juror's personal lives that could have been the basis for a challenge for cause or a peremptory challenge. The judge abused her discretion in disallowing the requested voir dire. The lower court's decision allowing this abuse to stand violates Mr. Drew's Sixth Amendment rights.

Because the opinion below conflicts with relevant decisions of this Court, the Court should grant the Petition for Writ of Certiorari.

CONCLUSION AND PRAYER

The decision of the Court of Appeals for the Fourteenth District of Texas conflicts with decisions of this Court. Therefore, Mr. Jonathan Drew respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

JACK B. ZIMMERMANN
Counsel of Record
TERRI R. Z. JACOBS
770 S. Post Oak Lane, Ste 620
Houston, Texas 77056
713-552-0300
713-552-0746 (Fax)
Attorneys for the Petitioner,
Jonathan D. Drew

Of Counsel:

ZIMMERMANN & LAVINE, P.C.
770 S. Post Oak Lane, Ste 620
Houston, Texas 77056

APPENDIX A

76 S.W.3d 436

Court of Appeals of Texas,
Houston (14th Dist.).

Jonathan David **DREW**, Appellant,
v.
The STATE of Texas, Appellee.

No. 14-99-01323-CR.

Feb. 14, 2002.
Discretionary Review Refused
June 26, 2002.

Terri R.Z. Jacobs, Jack B. Zimmerman, Houston, for appellant.

Rikke Burke Graber, Houston, for appellee.

Panel consists of Justices YATES, *ANDERSON*, and *SEYMORE*.

OPINION

CHARLES W. SEYMORE, Justice.

Appellant Jonathan David Drew appeals his conviction and life sentence for felony murder. We affirm.

I. BACKGROUND

On November 29, 1998, complainant Tina Flood and her friend Justin Chapman attended a birthday party at a bar in Seabrook, Texas. Appellant was introduced to Tina at the party. He bought her drinks, and they were seen kissing. When the bar closed and the party ended at 2:00 a.m., several people went to a Holiday Inn hotel. Because Tina was too intoxicated to drive to the hotel, she and

Chapman rode there with other people. Her car was left in parking lot next to the bar. When they attempted to check into their room, Chapman, who was a Holiday Inn employee, realized he had left his employee discount card in Tina's car. They saw appellant sitting in his pickup truck in the hotel parking lot and accepted his offer to take them back to the bar. Tina sat in the middle next to appellant, and Chapman sat in the passenger's side of the front seat.

When they arrived at the parking lot next to the bar, Chapman exited appellant's truck and held Tina's purse while she exited the truck. According to Chapman's testimony, Tina was attempting to scoot across the seat to the passenger-side door when appellant drove away. Chapman was between the open door and the body of the truck and held onto the door as appellant drove away. Chapman testified that Tina screamed for appellant to stop. As the truck pulled out of the parking lot, the door slammed shut and knocked Chapman into a ditch. Chapman ran to the bar and began beating on the front door.

At 2:52 a.m., Seabrook Police Officer Marc Hatton was on patrol when he saw Chapman beating on the bar's door. Chapman told Officer Hatton that his friend had just been kidnapped. Chapman described a maroon, full-sized, single-cab Chevrolet truck. The description of appellant's truck was broadcast to other officers in the area. At 3:49 a.m., Harris County Deputy Constable Sean Kitchens spotted appellant's truck, and he was stopped for failing to maintain a single lane of traffic. Deputy Kitchens asked appellant for his license. When appellant leaned over to retrieve his license from the console, Kitchens noticed a bloody foot lying on the seat. When asked who that was, appellant responded, "That's my friend Tina. She's knocked out over there." Tina was lying in a fetal position

against the passenger's door, naked except for her skirt, which was bunched around her waist. She had abrasions on her leg, buttocks, and arm. Deputy Kitchens called for backup assistance. After the backup arrived, appellant was asked to step out of the truck. Deputy Kitchens noticed a scratch on appellant's right arm, three scratches on the back and side of his neck, and what looked like blood on his shirt collar.

Tina was taken to the Clear Lake Regional Medical Center. Emergency Room Nurse Christine McFall conducted a sexual assault examination. According to McFall, Tina repeatedly stated, "Please help me. Please help me. Don't hurt me." Emergency Room Nurse Mary Jane Heady heard Tina state, "Please don't rape me." A CAT scan showed that Tina had sustained a skull fracture, which caused her brain to swell and hemorrhage. Surgery was performed, but Tina died a day and a half later because swelling in her brain. The State tried appellant for capital murder, however, the jury found him guilty of felony murder, and he was sentenced to life in prison.

II. ISSUES ON APPEAL

Appellant brings nineteen issues in this appeal, asserting (1) the evidence supporting his conviction is legally and factually insufficient; (2) the trial court erred in denying him the right to confront two witnesses; (3) he was denied due process and due course of law by the State's failure to disclose the probation status of two witnesses; (4) the trial court erred in admitting gruesome and unnecessary autopsy photographs; (5) the trial court erred in failing to instruct the jury about the required culpable mental state for felony murder; (6) the trial court

erred in failing to require a unanimous jury verdict on the underlying felony in order to convict him of felony murder; (7) the trial court erred in admitting Tina's hearsay statements; (8) the trial court erred in denying his motion to reopen voir dire; (9) the trial court erred in overruling his objection to the prosecutor's argument, which injected new and harmful facts into the case; and (10) the trial court erred in overruling his objection when the prosecutor, during final argument, injected his personal opinion that appellant committed an extraneous offense.

III. LEGAL & FACTUAL SUFFICIENCY

In his first two issues, appellant claims the evidence is legally and factually insufficient to establish either the underlying offense of kidnapping or aggravated sexual assault or the commission of an act clearly dangerous to human life. When reviewing the legal sufficiency of the evidence, we must view the evidence in a light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Wilson v. State,* 7 S.W.3d 136, 141 (Tex.Crim.App. 1999). In conducting this review, we do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure that the jury reached a rational decision. *Muniz v. State,* 851 S.W.2d 238, 246 (Tex.Crim. App.1993).

In reviewing the factual sufficiency of the evidence, we view all the evidence in a neutral light, both for and against the finding, and set aside the verdict only if "proof of guilt is so obviously weak as to undermine confidence in

the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State,* 23 S.W.3d 1, 11 (Tex.Crim.App. 2000). We review the fact-finder's weighing of the evidence and are authorized to disagree with the fact finder's determination. *Clewis v. State,* 922 S.W.2d 126, 133 (Tex.Crim.App.1996). Our review, however, must be appropriately deferential so as to avoid substituting our own judgment for that of the fact-finder. *Jones v. State,* 944 S.W.2d 642, 648 (Tex.Crim.App.1996).

Chapman testified that appellant drove away as Tina was attempting to exit his truck. It appeared to Chapman that appellant was holding onto her. Chapman heard her scream for appellant to stop as he drove away. Although Chapman tried to hold onto the truck door, he was thrown to the ground. Officer Haddon, the police officer who found Chapman beating on the door of the bar for help, testified that Chapman's pants were covered in mud and that he was almost hysterical.

When Officer Kitchens pulled appellant's truck over, he found Tina curled in the front seat naked, unconscious, bloody, bruised, and scraped. Appellant had a long scratch on his arm, scratches on his neck, and what looked like blood on his collar. A search of the car revealed a pair of men's underwear, Tina's underwear, and her blouse.

The forensic evidence shows that Tina's injuries were extensive. Dr. Paul Schrode, the medical examiner who performed the autopsy, testified there were at least two distinct fractures to Tina's skull, the result of one or possibly two separate acts of blunt trauma. He stated that a considerable amount of force was required to cause those fractures. Next, Dr. Schrode testified there was an

abrasion on the back of Tina's head and a bruise on the back of her brain immediately below the point of impact. On the opposite side of her head, there was a massive amount of bleeding, but no external bruise on her skin. Such an injury is typically found where a moving head strikes a stationary object. Dr. Schrode stated the injury to Tina's skull was consistent with her moving head striking a stationary object.

Dr. Schrode also testified that Tina's ear was swollen and that there was a bruise behind the ear. He stated that, while this bruise could be related to the skull fracture, swelling of the ear indicated the injury was probably caused by a separate impact. According to Dr. Schrode, the injury to Tina's ear was more consistent with something striking her or her head striking something on that side.

Regarding the abrasions and contusions on Tina's shoulder, shoulder blade, elbow, lower back, and buttocks, Dr. Schrode testified they were consistent with being dragged on a rough surface, such as concrete. He also described a wrinkling or crumpling of the skin on Tina's back, which suggests that something scraped across her back, consistent with the skin having been stepped on. Dr. Schrode further stated Tina's abrasions were not consistent with those that might result from jumping out of a moving vehicle.

Dr. Schrode also found bruising in the soft tissue of both sides of Tina's neck. He testified this was caused by direct external compression, often seen in manual strangulations. Further, there were small oval contusions on Tina's lower legs, ankles, and upper right arm, consistent with finger impressions. Dr. Schrode also observed abrasions on Tina's knuckles and the meaty part

of the thumbs of both hands, suggesting defensive injuries. The evidence showed appellant had scratches on his right arm and neck.

The anal swabs taken during the sexual assault examination contained a mixture of DNA from appellant and Tina. While there were no obvious abrasions or tears in the vagina and anal area, Dr. Schrode testified the area was a little darker than normal, which suggests, but does not confirm, trauma. He did not cut into the area to determine whether there was any bruising underneath the skin. While bruising around the vaginal or anal area is usually an indication of sexual assault, he has performed autopsies in cases where there has been an alleged sexual assault, but no bleeding, tearing, or abrasions.

Appellant contends there is no evidence that he struck Tina or that he caused her head to strike a stationary object; instead, Tina could have sustained injuries before leaving the party, from accidentally falling over backward, or falling out of the truck. Although Tina had been drinking, the testimony showed that Tina was not "falling on her face drunk" and that she was able to "function and walk." Moreover, two or three distinct traumas to Tina's head supports an inference her injuries were not sustained as a result of a single accidental fall. Further, Tina's hand injuries and appellant's scratches indicate that she defended herself. Also, the evidence showed that Tina did not go with appellant willingly. Finally, no evidence showed that Tina sustained any of her injuries before she was alone with appellant, particularly her life-ending skull fractures.

After reviewing the evidence in a light most favorable to the verdict, we find the evidence is legally sufficient to

support the underlying offenses of kidnapping and aggravated sexual assault and the commission of an act clearly dangerous to human life.

Appellant called two witnesses in his defense, Dr. Linda Norton and John Opiala. Dr. Norton, a forensic pathologist, agreed with Dr. Schrode's conclusion that Tina sustained her skull fractures and abrasions when her moving head struck a stationary object. Dr. Norton concluded those injuries were not sustained as the result of an assault, but happened when an intoxicated Tina fell backward, hit her head on the ground, and then slid a short distance. Dr. Norton testified that she has encountered multiple cases in which an intoxicated person has fallen backward and struck a hard surface with sufficient force to cause similar head injuries. Dr. Norton admitted, however, it was possible that Tina sustained the head injury when she was slammed against an object and dragged for a distance. As to the injuries to Tina's hands, Dr. Schrode explained alternatively that a person could sustain those injuries by catching herself against a hard surface when falling.

Dr. Norton also attributed bruising of the tissue in Tina's neck to such medical intervention as the insertion of a breathing tube. Even Dr. Schrode, when testifying that such bruising is often seen in manual strangulations, cautioned, "I don't want to suggest that she was manually strangled because I don't have any other signs."

Dr. Norton testified that in her review of the sexual assault report, the hospital records, and the autopsy report, she found no evidence of any injury or trauma to the anal and vaginal areas. However, on cross-examination, Dr. Norton stated that lack of injury does not

eliminate the possibility of sexual assault. With respect to color variation in Tina's genital region, Dr. Norton stated such variation is normal.

Appellant complains the only evidence of abduction was Chapman's "discredited" testimony. Appellant, without citation to the record, states Chapman "told the police different stories, admitted he would lie to the jury, and absconded during trial after his probation status was discovered." Appellant also called John Opiala, a manager of a bar, to testify that Chapman had a reputation for untruthfulness. Apparently, Opiala's opinion of Chapman's reputation was based on Chapman's alleged attempt to use false identification when dealing with a waitress in Opiala's bar. Opiala could not, however, remember the waitress's name or any other person with whom he had spoken about Chapman's reputation for untruthfulness.

The State and appellant presented the jury with conflicting theories of how Tina sustained her injuries. It is the jury's duty, as the fact-finder, to determine the weight and credibility to give any testimony. Because we find the record does not reveal that a different result is warranted, we must defer to the jury's determination regarding the weight given to, and the credibility of, controverted testimony. *See Johnson,* 23 S.W.3d at 8. We do not find the "proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or . . . is greatly outweighed by contrary proof." *Id.* at 11. Accordingly, we hold the evidence is factually sufficient to support appellant's conviction for felony murder. Appellant's first and second issues are overruled.

IV. FAILURE TO DISCLOSE

In his seventh, eighth, ninth, and tenth issues, appellant claims he was denied due process and due course of law by the State's failure to disclose the probation status of Justin Chapman[1] and the deferred adjudication probation status of Ruffini. The prosecution has an affirmative duty to disclose all material evidence favorable to the defense. *McFarland v. State,* 928 S.W.2d 482, 511 (Tex. Crim.App.1996) (citing *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). Both impeachment evidence and exculpatory evidence are within the scope of the *Brady* rule. *Wyatt v. State,* 23 S.W.3d 18, 27 (Tex.Crim.App.2000) (citing *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The prosecutor violates the Due Process Clause of the Fourteenth Amendment when he fails to disclose material evidence that is favorable to the accused. *Thomas v. State,* 841 S.W.2d 399, 404 (Tex.Crim.App.1992). "*Brady* has been extended to include the required revelation to an accused of material exculpatory evidence in the possession of police agencies and other parts of the 'prosecutorial team.'" *Ex parte Mitchell,* 977 S.W.2d 575, 578 (Tex.Crim.App.1997) (citing *Kyles v. Whitley,* 514 U.S. 419,

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[1] The trial court granted appellant's pretrial motions requesting criminal backgrounds on all the State's witnesses, including pending charges and information relevant to potential bias. On the final day of trial, during punishment, appellant's trial counsel announced he had just learned that Chapman was on probation. The prosecutor responded that he was unaware of this. After investigating the matter, the prosecutor confirmed that Chapman had been placed on probation for misdemeanor driving while intoxicated in another county on May 4, 1999, after he had given his statements to the police regarding this case.

115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). The prosecutor, however, has no duty to turn over evidence that would be inadmissible at trial. *Lagrone v. State,* 942 S.W.2d 602, 615 (Tex.Crim.App.1997). The three-part test used to determine "whether a prosecutor's actions have violated due process is whether the prosecutor (1) failed to disclose evidence (2) favorable to the accused and (3) the evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Little v. State,* 991 S.W.2d 864, 866 (Tex.Crim.App.1999).

Appellant contends the facts of this case satisfy the three-part test because the prosecutor failed to disclose Chapman's and Ruffini's probation status – evidence which was favorable to him. Appellant contends that his inability to cross-examine Chapman about possible bias undermined confidence in the outcome of the trial. Appellant asserts that Chapman's testimony was the only evidence supporting the kidnapping offense and the only evidence controverting testimony from the State's other witnesses that Tina and appellant had been enjoying each other's company at the party. Likewise, with regard to Ruffini, appellant asserts that her deferred adjudication probation would have caused the jury to view differently her unreported and uncorroborated account of sexual assault by appellant.

We disagree that Chapman and Ruffini's probationary status was material, i.e., created a probability sufficient to undermine confidence in the jury's verdict. *See Thomas,* 841 S.W.2d at 404. In making this determination, we have examined the alleged error in the context of the entire record and in context of the overall strength of the State's case. *Id.* Chapman received one year's probation in a

different county for a misdemeanor; his offense occurred several months after Tina's death, but before appellant's trial. In the context of the record, the value of this misdemeanor probation in showing bias is slight. Chapman's account of Tina's kidnapping to police soon after appellant drove away with her is consistent with his trial testimony. Additionally, the other evidence, much of which we have already detailed, is strong proof that Tina suffered extreme violence at appellant's hands. We are convinced that Chapman's probationary status is insufficient to undermine confidence in the outcome of the trial.

Similarly, Ruffini's deferred adjudication probation for credit card abuse and outstanding warrant for failure to complete her probation was not material. Ruffini testified that appellant, her neighbor, raped her when she was fourteen and he was sixteen years old. In addition to Ruffini's testimony, six other women testified in the punishment phase that appellant had raped or forced unwanted sexual contact on them. There are similarities between the details of these attacks and Tina's kidnapping and rape. Two of the women were teenagers at the time of the attacks and schoolmates or friends of appellant. For one, appellant offered to give her a ride and then tried to force sex on her at their destination. He also forced his fingers inside her vagina. In trying to force sex on the other teen, appellant ripped her shirt, struck her in the face, and chased her while declaring, "You know you want it." Two of the women who testified at punishment were strippers whom appellant had hired and then raped in the midst of their striptease. One of the strippers was raped vaginally and anally, and she reported seeing a knife in appellant's bedside table. The final two women who testified were strangers to appellant, but lived near Calder

Road, a street significant in Tina's case. Of these two women, one was grabbed by appellant from behind, cut on the arm, and chased in circles around her truck before appellant gave up and fled. The other woman testified that appellant and another man abducted her in her car, drove to an isolated trailer, and anally and vaginally raped her over several hours. During part of the episode, appellant carried a knife and threatened to kill her.

Considering the above testimony and graphic evidence depicting Tina's kidnapping, aggravated sexual assault, and death, we hold that the result of the proceeding would not have been different had the State timely disclosed Ruffini's abuse of a gas-station credit card and her deferred adjudication probation for the offense.

Accordingly, we overrule appellant's seventh, eighth, ninth, and tenth issues.

V. BIAS OF STATE WITNESSES

In his third, fourth, fifth, and sixth issues, appellant claims he was denied his right to confront two of the State's witnesses, Justin Chapman and Wendy Ruffini. The Sixth Amendment to the U.S. Constitution guarantees the accused's right to be confronted with adverse witnesses. *Lopez v. State,* 18 S.W.3d 220, 222 (Tex.Crim. App.2000). "Each Confrontation Clause issue must be weighed on a case-by-case basis, carefully taking into account the defendant's right to cross-examine and the risk factors associated with the admission of the evidence." *Id.* The trial court may limit cross-examination when a subject is exhausted, when it is designed to annoy, harass, or humiliate, or when it might endanger the witness's personal safety. *Carroll v. State,* 916 S.W.2d 494, 498

(Tex.Crim.App.1996). The right to confrontation is violated, however, when appropriate cross-examination is limited. *Id.* at 497. It is well settled that "[w]ithout question, a witness'[s] bias is a relevant issue at trial, and the Confrontation Clause gives a criminal defendant the right to explore potential biases of an accusing witness through cross-examination." *Hoyos v. State,* 982 S.W.2d 419, 420-21 (Tex.Crim.App.1998); *see also Carpenter v. State,* 979 S.W.2d 633, 634 (Tex.Crim.App.1998) (stating that "[e]xposing a witness'[s] motivation to testify for or against the accused or the State is a proper and important purpose of cross-examination"). Thus, "[t]his broad scope necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witness'[s] testimony might be empowered to exercise control." *Carroll,* 916 S.W.2d at 498.

A. Justin Chapman

Appellant contends his right to confront Chapman was denied when he was not permitted to cross-examine him about his misdemeanor probation for driving while intoxicated. Appellant asserts Chapman's probation status made him vulnerable because he had violated several conditions of his probation. Appellant maintains that, absent Chapman's testimony during the guilt-innocence stage of the trial, there was no evidence to support a theory of kidnapping and "very scant circumstantial evidence that sexual relations were nonconsensual." Appellant argues the jury might have given less weight to Chapman's testimony if it had known that Chapman was on probation and had violated the conditions of his probation and, therefore, had motive to testify for the State.

Appellant concludes Chapman "was so afraid of having his probation revoked that he became a fugitive after he testified but before the conclusion of the trial." The prosecutor contends neither he nor the investigator were aware of Chapman's probation before his testimony. The record shows that the prosecutor tried to contact Chapman but did not know his location. The prosecutor stated, "Justin Chapman's whereabouts are unknown. I was looking for Justin Chapman myself this morning. His whereabouts are currently unknown."

We find no error by the trial court and reiterate that Chapman's probationary status was not material, i.e., created a probability sufficient to undermine confidence in the jury's verdict. *See Thomas,* 841 S.W.2d at 404. In addition, Chapman was excused immediately after testifying on October 5, 1999, appellant did not reserve the right to recall Chapman for further cross-examination, and Chapman thus had no obligation to remain at the courthouse or to remain in contact with the prosecutor until the conclusion of trial. *See, e.g., French v. Brodsky,* 521 S.W.2d 670, 678 (Tex.Civ.App. – Houston [1st Dist.] 1975, writ ref'd n.r.e.), *overruled on other grounds by Texarkana Memorial Hosp., Inc. v. Jones,* 551 S.W.2d 33 (Tex.1977) (indicating an individual was not excused as a witness but instructed to remain in attendance). We overrule appellant's third and fourth issues.

B. Wendy Ruffini

During the punishment phase, Ruffini testified that appellant raped her ten years earlier, when she was fourteen years of age. She admitted that the assault was never reported to police. At the time of trial, Ruffini was

on deferred adjudication probation for credit card abuse, a third degree felony. Appellant sought to cross-examine Ruffini about her probation to show her motive in testifying for the State. Further, appellant's counsel informed the trial court that Ruffini had failed to adhere to her probationary terms and that there was an outstanding warrant for her arrest. The prosecutor advised the trial court that no one on the prosecutorial team knew about the outstanding arrest warrant until just a few minutes earlier.

During appellant's bill of exceptions, Ruffini stated she asked an attorney to look into the credit card case because she had not heard anything about it for years. Ruffini stated she was unconcerned about her case, uninterested in currying favor with the State, and unconcerned with the State treating her more favorably than if she had testified against the State. The prosecutor stated that Ruffini was in custody and she would not be allowed to leave the courtroom until the issue regarding the arrest warrant had been resolved. Ruffini was actually taken into custody at that time and was still in custody two days later.

In the presence of the jury, appellant was allowed to ask Ruffini whether she wished "to curry favor" by testifying for the State. Ruffini denied appellant's assertion. After appellant made his bill of exceptions, the trial court concluded he had failed to show that Ruffini testified as a result of bias or motive and did not allow him to further pursue the subject.

Appellant complains he suffered harm because Ruffini's testimony "served to cement the State's theory of a ten-year-long pattern of allegations of sexual assaults by Mr. Drew justifying a life sentence." Appellant argues that

because Ruffini's testimony was neither contradicted nor cumulative, her credibility was important. Appellant states that Ruffini's fear of going to the penitentiary, having violated her probation and having been placed in custody during recess, biased her and provided a motive to curry favor with the State.

A defendant is permitted to cross-examine the State's witness on the status of her deferred adjudication probation to show a potential motive, bias, or interest to testify for the State. *Maxwell v. State,* 48 S.W.3d 196, 200 (Tex.Crim.App.2001). We find the trial court erred in not permitting appellant to cross-examine Ruffini about a potential motive, bias, or interest in testifying for the State in this case.[2]

To determine whether the error requires reversal, we begin with the assumption "the damaging potential of the cross-examination were fully realized." *Shelby v. State,* 819 S.W.2d 544, 547 (Tex.Crim.App.1991). We next consider the following factors: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence

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[2] We note that at the time of trial, "denying a defendant the right to impeach a witness on the basis of the witness' [sic] deferred adjudication probation [did] not deny the defendant his constitutional right of confrontation." *Jones v. State,* 843 S.W.2d 487, 496 (Tex.Crim. App.1992); *Hoyos v. State,* 951 S.W.2d 503, 507 (Tex.App. – Houston [14th Dist.] 1997), *aff'd,* 982 S.W.2d 419 (Tex.Crim.App.1998). However, the Court of Criminal Appeals, in *Maxwell,* has since held "that a defendant is permitted to cross-examine a State's witness on the status of his deferred adjudication probation in order to show a potential motive, bias or interest to testify for the State" and has specifically disavowed any language in *Jones* holding otherwise. *Maxwell,* 48 S.W.3d at 200.

corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the State's case. *See id.* In addition to Ruffini's testimony, four other women testified at punishment that they had been sexually assaulted by appellant. Three additional women testified that they had been physically attacked by him. Having considered this testimony and the remaining factors, we find the trial court's error harmless. *See* Tex.R.App. P. 44.2(a). Accordingly, we overrule appellant's fifth and sixth issues.

VI. AUTOPSY PHOTOGRAPHS

In his eleventh issue, appellant claims the trial court erred in admitting ten "gruesome, detailed, color, close-up" post-autopsy photographs because the prejudicial effect significantly outweighed any probative value. The rules of evidence govern admissibility of inflammatory photographs. *Hicks v. State,* 860 S.W.2d 419, 426 (Tex.Crim. App.1993), *overruled on other grounds by Rosales v. State,* 4 S.W.3d 228 (Tex.Crim.App.1999), *cert. denied,* 531 U.S. 1016, 121 S.Ct. 576, 148 L.Ed.2d 493 (2000). Rule 403 requires an admissible photograph to have "'some probative value and that its probative value not be substantially outweighed by its inflammatory nature.'" *Rojas v. State,* 986 S.W.2d 241, 249 (Tex.Crim.App.1998) (quoting *Long v. State,* 823 S.W.2d 259, 272 (Tex.Crim.App.1991)). In determining whether the inflammatory nature outweighs its probative value, the trial court should consider "the inherent tendency that some evidence may have to encourage [the] resolution of material issues on an inappropriate basis and should balance carefully against it the host of factors affecting probativeness, including relative

weight of the evidence and the degree to which its proponent might be disadvantaged without it." *Fuller v. State,* 829 S.W.2d 191, 206 (Tex.Crim.App.1992), *overruled on other grounds by Castillo v. State,* 913 S.W.2d 529 (Tex.Crim.App.1995). Relevant factors in ascertaining the admissibility of photographs under Rule 403 include the number of exhibits offered, their gruesomeness, detail, size, whether they are black and white or color, whether they are close-up, whether the body is naked or clothed, the availability of other means of proof, and other circumstances unique to the individual case. *Santellan v. State,* 939 S.W.2d 155, 172 (Tex.Crim.App.1997). It is within the trial court's discretion to admit photographs and its decision is disturbed on appeal only if it falls outside the zone of reasonable disagreement. *Jones v. State,* 944 S.W.2d 642, 651 (Tex.Crim.App.1996).

Autopsy or post-autopsy photographs can be used to illustrate injuries and to reveal cause of death. *Ladner v. State,* 868 S.W.2d 417, 426 (Tex.App. – Tyler 1993, pet. ref'd). As long as the post-autopsy photograph aids the jury in understanding the injury and does not emphasize mutilation caused by the autopsy, the photograph is admissible even though it depicts the autopsy. *Todd v. State,* 911 S.W.2d 807, 819 (Tex.App. – El Paso 1995, no pet.); *see also Rojas,* 986 S.W.2d at 249 (stating autopsy photographs are generally admissible unless they depict mutilation of victim caused by autopsy itself). Rule 403 favors the admission of relevant evidence and presumes that relevant evidence will be more probative than prejudicial. *Etheridge v. State,* 903 S.W.2d 1, 21 (Tex.Crim. App.1994); *Green v. State,* 840 S.W.2d 394, 410 (Tex.Crim. App.1992), *overruled on other grounds by Trevino v. State,*

991 S.W.2d 849 (Tex.Crim.App.1999). Moreover, photographs are generally admissible where verbal testimony about the same matter is admissible. *Jones,* 944 S.W.2d at 652; *Emery v. State,* 881 S.W.2d 702, 710 (Tex.Crim. App.1994).

Appellant specifically complains of post-autopsy photographs depicting (1) Tina's head with the top part of the skull sawed off, exposing the brain; (2) the skull with the scalp pulled over her face; (3) the interior part of the skull with the brain removed; (4) the brain outside the skull; and (5) the excised windpipe.[3] The record shows the photographs are close-up, in color, and 3 1/2 by 5 inches in size. Appellant contends other means of proof were available, such as testimony of the medical examiner, the autopsy report, and diagrams. With regard to circumstances unique to this case, appellant states there was no eyewitness to testify about how Tina sustained her injuries, therefore, "the medical examiner's testimony was crucial in conjuring up in the juror's minds what could have happened to result in the findings he made."

At trial, when appellant objected to the introduction of the photographs on the ground that the prejudicial effect

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[3] Appellant also states that in addition to the ten post-autopsy photographs, there were four unnecessary photographs related to medical procedures performed at the hospital, which show (1) bruises on Tina's face; due to hemorrhaging, with tubes coming from her nose; (2) a side view of Tina's shaven head with several incision wounds and large stitches; (3) Tina's entire naked body, with the incision wounds and stitches in her head; and (4) a tube coming from her genitalia. Appellant, however, has not specifically complained of those four photographs on appeal and, therefore, we need not consider the trial court's decision to admit them.

significantly outweighed any probative value, the State responded that the photographs would aid the medical examiner in describing to the jury the injuries and the cause of death. However, during appellant's voir dire, the medical examiner testified that it was unnecessary to use autopsy photographs to explain Tina's injuries to the jury. The record reveals the medical examiner nonetheless used the photographs in describing Tina's injuries. For example, viewing the large area of bruising on the opposite side of Tina's brain from the location of the external injury, the medical examiner explained in detail that the internal examination of Tina's head revealed that the injury was caused by her moving head hitting a stationary object. Similar post-autopsy photographs have been held to be admissible to aid the jury in understanding the victim's injuries and cause of death.[4]

Appellant's expert witness, a forensic pathologist, did not personally view the body, but reached her conclusions after reviewing the post-autopsy photographs, in addition to reviewing the medical records and the autopsy report. Appellant's expert testified that Tina received her head injuries from an accidental fall.

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[4] *See, e.g., Harris v. State,* 661 S.W.2d 106, 107 (Tex.Crim. App.1983) (color photograph showing child's skull after skin had been deflected back); *Todd,* 911 S.W.2d at 820 (photo of brain in skull); *Phipps v. State,* 904 S.W.2d 955, 958 (Tex.App. – Beaumont 1995, no pet.) (8" x 12" color photograph depicting head with top layer of skin peeled back); *Ladner,* 868 S.W.2d at 426-27 (enlarged photograph showing victim's scalp pulled back from the head); *Sandow v. State,* 787 S.W.2d 588, 597 (Tex.App. – Austin 1990, pet. ref'd) (photograph showing victim's brain with pool of blood in depressed area near forehead).

With regard to the photograph of Tina's windpipe, the record shows the medical examiner and appellant's expert also disagreed about the injuries. The medical examiner testified that the bruising indicated direct compression of the neck, which is often present in cases involving manual strangulations, while the defense expert testified the soft tissue hemorrhage around Tina's neck was caused by the insertion of a breathing tube.

We find the trial court did not err in admitting the post-autopsy photographs. We conclude the photographs were admissible to rebut the defensive theory that Tina's death was an accident. *See Phipps,* 904 S.W.2d at 958 (concluding that photographs aided determination of whether victim's death was result of intentional act or accident); *Ladner,* 868 S.W.2d at 427 (finding photographs, along with pathologist's testimony, discredited defense theory of cause of death). Further, we conclude the photographs were admissible in light of the competing theories offered by the State and appellant.

In any event, even if the trial court erred in admitting any of the post-autopsy photographs, a conviction will not be reversed "merely because the jury was exposed to numerous admittedly 'gruesome' pictures." *Long,* 823 S.W.2d at 275. The erroneous admission of evidence is nonconstitutional error and is subject to harm analysis under Texas Rule of Appellant Procedure 44.2(b), which provides "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex.R.App. P. 44.2(b). In other words, after examining the record as a whole, the appellate court must disregard this error if it has fair assurance that the error did not influence the jury or had but a slight effect. *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998). We

find the admission of the post-autopsy photograph did not affect appellant's substantial rights. Accordingly, we overrule appellant's eleventh issue.

VII. JURY INSTRUCTION: CULPABLE MENTAL STATE

In his twelfth issue, appellant contends the trial court erred in refusing to include a culpable mental state in the jury instruction on felony murder. To reverse on the basis of charge error, Article 36.19 of the Texas Code of Criminal Procedure provides, in relevant part:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17, and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial.

Tex.Code.Crim. Proc. Ann. art. 36.19 (Vernon 1981).

If the defendant timely objects to error in the charge, reversal is required if the error is " 'calculated to injure the rights of defendant,' which means no more than that there must be some harm to the accused from the error." *Ovalle v. State,* 13 S.W.3d 774, 786 (Tex.Crim.App.2000) (quoting *Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim. App.1984)). In other words, properly preserved error will require reversal so long as the error is not harmless. *Id.* Thus, in reviewing charge error, " 'the actual degree of harm must be assayed in light of *the entire jury charge,* the state of the evidence, including the contested issues

and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.'" *Id.* (quoting *Almanza,* 686 S.W.2d at 171) (emphasis added).

Section 19.02(b)(3) of the Texas Penal Code provides that a person commits felony murder if he

> commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Pen.Code Ann. § 19.02(b)(3) (Vernon 1994).

The felony murder rule dispenses with the necessity of proving the *mens rea* accompanying the homicide because the underlying felony supplies the culpable mental state. *Johnson v. State,* 4 S.W.3d 254, 255 (Tex.Crim.App.1999); *Murphy v. State,* 665 S.W.2d 116, 120 (Tex.Crim. App.1983).

The jury charge in this case defined felony murder:

> A person commits the offense of felony murder if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of the individual.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 30th day of November, 1998, in Harris County, Texas, the

defendant, Jonathan David Drew, on or about the 30th day of November, 1998, did then and there unlawfully, while in the furtherance of the commission of the felony of kidnapping of Tina Flood or in immediate flight from the commission of the felony of kidnapping of Tina Flood, the defendant committed an act clearly dangerous to human life that caused the death of Tina Flood, to-wit: by striking Tina Flood with an unknown object; or

If you find from the evidence beyond a reasonable doubt that on or about the 30th day of November, 1998, in Harris County, Texas, the defendant, Jonathan David Drew, on or about the 30th day of November, 1998, did then and there unlawfully, while in the furtherance of the commission of the felony of aggravated sexual assault of Tina Flood or in immediate flight from the commission of the felony of aggravated sexual assault of Tina Flood, the defendant committed an act clearly dangerous to human life that caused the death of Tina Flood, to wit: by striking Tina Flood with an unknown object; or

If you find from the evidence beyond a reasonable doubt that on or about the 30th day of November, 1998, in Harris County, Texas, the defendant, Jonathan David Drew, on or about the 30th day of November, 1998, did then and there unlawfully, while in the furtherance of the commission of the felony of kidnapping of Tina Flood or in immediate flight from the commission of the felony of kidnapping of Tina Flood, the defendant committed an act clearly dangerous to human life that caused the death of Tina Flood, to-wit: by causing Tina Flood to strike an unknown object; or

> If you find from the evidence beyond a reasonable doubt that on or about the 30th day of November, 1998, in Harris County, Texas, the defendant, Jonathan David Drew, on or about the 30th day of November, 1998, did then and there unlawfully, while in the furtherance of the commission of the felony of aggravated sexual assault of Tina Flood or in immediate flight from the commission of the felony of aggravated sexual assault of Tina Flood, the defendant committed an act clearly dangerous to human life that caused the death of Tina Flood, to-wit: by causing Tina Flood to strike an unknown object, then you will find the defendant guilty of felony murder.

Although felony murder requires that a culpable mental state be proved for the predicate offense, which is then transferred to the killing, appellant complains the jury was not instructed to find a culpable mental state for the underlying allegations of aggravated sexual assault or kidnapping. Appellant claims if the jury believed, as it must have, that Tina's death was accidental, it could not lawfully transfer the intent or knowledge, unless the trial court's instruction included the required culpable mental state for the underlying offense of aggravated sexual assault or kidnapping. A review of the charge establishes that although definitions of aggravated sexual assault and kidnapping and their culpable mental states were not included in the instruction for felony murder, the underlying felonies were defined with their culpable mental states under capital murder and as lesser included offenses.

The charge tracks the language of the felony murder statute. A charge that tracks the language of the applicable statute is generally proper on the statutory issue. *Martinez v. State,* 924 S.W.2d 693, 699 (Tex.Crim.

App.1996); *Riddle v. State,* 888 S.W.2d 1, 8 (Tex.Crim. App.1994). The State argues the trial court instructed the jury to find appellant guilty of felony murder if it found that he had committed an act clearly dangerous to Tina's life that caused her death, while in the course of committing either kidnapping or aggravated sexual assault. Therefore, the jury was necessarily required to find appellant guilty of either kidnapping or aggravated sexual assault to convict appellant of felony murder. We agree. The trial court defined those underlying felonies twice in the charge. Considering the charge as a whole, we find the charge sufficiently instructed the jury on the culpable mental states for kidnapping and aggravated sexual assault. *See Dinkins v. State,* 894 S.W.2d 330, 339 (Tex.Crim.App.1995) ("When we review a charge for alleged error, we must examine the charge as a whole instead of a series of isolated and unrelated statements."). Appellant's twelfth issue is overruled.

VIII. JURY INSTRUCTION: UNANIMOUS FINDING

In his thirteenth issue, appellant claims the trial court erred in failing to charge the jury that all its members must unanimously agree that one of the underlying offenses, either kidnapping or aggravated sexual assault, was proved beyond a reasonable doubt. Appellant argues, therefore, some jurors could have found him guilty of aggravated sexual assault, while other jurors could have found him guilty of kidnapping.

The Texas Court of Criminal appeals has addressed this issue. *See Kitchens v. State,* 823 S.W.2d 256 (Tex.Crim.App.1991). In *Kitchens,* the defendant, who had been convicted of capital murder, argued the trial court

had erred in submitting to the jury alternative theories of capital murder in one application paragraph. *Id.* at 257. The defendant complained the verdict would not be unanimous because some jurors could have found him guilty of murder in the course of aggravated sexual assault while other jurors could have found him guilty of murder in the course of robbery. *Id.* The court rejected the defendant's argument and noted that alternate pleading of the differing methods of committing one offense may be charged in one indictment. *Id.* at 258. Moreover, although the indictment may include allegations of different methods of committing the offense in the conjunctive, the jury may be properly charged in the disjunctive. *Id.* Therefore, when the alternate theories of committing the same offense are submitted to the jury in the disjunctive, it is appropriate for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted. *Id.* In other words, "'there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Id.* (quoting *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion) (quoting *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990))).

The State argues the reasoning in *Kitchens* also applies to felony murder, i.e., that the jury was not required to agree on appellant's guilt in the underlying offense. The distinguishing element between capital murder and felony murder is the culpable mental state of the offender. *Rousseau v. State,* 855 S.W.2d 666, 673 (Tex.Crim.App.1993). Capital murder requires the existence of an intentional cause of death, while felony murder requires an intent to commit only the underlying offense.

Creel v. State, 754 S.W.2d 205, 211 (Tex.Crim.App.1988). The State argues there is no difference in the purpose of the underlying felonies for capital murder and felony murder. Therefore, the jury was not required to agree upon kidnapping or aggravated sexual assault in convicting appellant for felony murder.

Appellant contends the logic underlying *Kitchens* does not apply to felony murder. For an intentional murder to be a capital offense, it merely has to be committed in the course of committing another designated felony; which felony does not matter. *See* Tex. Pen.Code Ann. § 19.03(a)(2) (Vernon 1994). The *culpable mental state for capital murder is supplied by the intentional murder. See Rousseau,* 855 S.W.2d at 673 ("[T]he only difference between the two offenses is the culpable mental state of the offender. . . . Capital murder requires the existence of an 'intentional cause of death,' . . . while in felony murder, 'the culpable mental state for the act of murder is supplied by the mental state accompanying the underlying . . . felony. . . . '") (quoting *Rodriquez v. State,* 548 S.W.2d 26, 29 (Tex.Crim.App.1977)). To be guilty of felony murder, appellant argues, on the other hand, the jury must find a defendant had the required culpable mental state to commit a specific underlying felony because the underlying offense supplies the requisite mental state.

Citing this court to *Francis v. State,* appellant further asserts that without the unanimity requirement, the jury risks convicting the defendant on different acts. *Francis v. State,* 36 S.W.3d 121, 125 (Tex.Crim.App.2000) (opinion on reh'g) (citing *United States v. Holley,* 942 F.2d 916, 925 (5th Cir.1991)). In *Francis,* the defendant was charged with one count of indecency with a child in a single paragraph indictment. *Id.* at 122. The State presented evidence

of four distinct acts of indecency with a child, two acts of touching the victim's breasts and two acts of touching the victim's genitals, with each act occurring at a different time and date. *Id.* The State elected to pursue a conviction based on two of the incidents, one involving touching the victim's breasts and one involving touching the victim's genitals. *Id.* The court concluded *Kitchens* was not applicable to that case. *Id.* at 123. Unlike *Kitchens,* where alternate theories of committing the same offense were submitted to the jury, the *Francis* court found *two separate offenses* were submitted to the jury in the disjunctive. *Id.* at 124.[5] "By doing so, it is possible that six members of the jury convicted appellant on the breast-touching offense (while the other six believed he was innocent of the breast-touching) and six members convicted appellant on the genital-touching offense (while the other six believed he was innocent of the genital-touching)." *Id.* at 125.

We find *Francis* is distinguishable and, instead, conclude *Kitchens* is the controlling authority in this case. As in *Kitchens,* we find alternate methods of committing felony murder, not separate offenses, were submitted to the jury. When there is more than one way to commit an offense, there is no general requirement that the jury agree on the means of committing that offense:

> As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. That rule is not

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[5] The charge in *Francis* inquired whether the defendant had "engaged in sexual contact by touching the breast *or* genitals." *Francis,* 36 S.W.3d at 124. (emphasis in original).

> only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Schad, 501 U.S. at 649-50, 111 S.Ct. 2491 (Scalia, J., concurring) (citations omitted). The evidence is sufficient to support aggravated sexual assault or kidnapping; therefore, the evidence is sufficient to support a conviction for felony murder. We overrule appellant's thirteenth issue.

IX. HEARSAY

In his fourteenth and fifteenth issues, appellant contends the trial court erred in admitting Tina's hearsay statements because such statements were not admissible as excited utterances. A hearsay statement is admissible as an excited utterance when it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tex.R. Evid. 803(2); *Wood v. State,* 18 S.W.3d 642, 652 (Tex.Crim.App.2000). In determining whether a statement is an excited utterance, the "pivotal inquiry is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event.'" *King v. State,* 953 S.W.2d 266, 269 (Tex.Crim.App.1997) (quoting *McFarland v. State,* 845 S.W.2d 824, 846 (Tex.Crim.App.1992), *overruled on other grounds by Bingham v. State,* 915 S.W.2d 9 (Tex.Crim.

App.1994)). The time elapsed between the occurrence of the event and the utterance is only one factor to consider in determining the admissibility of the hearsay statement. *Lawton v. State,* 913 S.W.2d 542, 553 (Tex.Crim.App.1995). Therefore, if the statements were made while the declarant was in the grip of the emotion, excitement, fear, or pain of the event, and those statements relate to the exciting event, they are admissible even if appreciable time has elapsed between the exciting event and the making of the statement. *Jones v. State,* 772 S.W.2d 551, 555 (Tex.App. – Dallas 1989, pet ref'd) (citing *Penry v. State,* 691 S.W.2d 636, 647 (Tex.Crim.App.1985)). The fact that the declaration was in response to questions is likewise only one factor for consideration and does not alone render the statement inadmissible. *Lawton,* 913 S.W.2d at 553.

Tina stated at various times in the emergency room, "Please help me," "Don't hurt me," and "Please don't rape me."[6] Tina made these statements one to three hours after Deputy Kitchens first pulled appellant over. Appellant argues because there had been a passage of time and because Tina had undergone painful and unpleasant medical procedures, including a "rape kit" examination, her statements were not excited utterances, but could have been in response to the painful medical treatments. Therefore, according to appellant, there was no proof

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[6] Officer Hatton observed Chapman banging on the doors of the bar at 2:52 a.m. Deputy Kitchens first encountered appellant and Tina at 3:49 a.m. Therefore, Tina's injuries occurred during that hour. Tina arrived at the hospital at 4:40 a.m.

about what the alleged startling event was for the excited utterance exception.

In the hospital emergency room, Tina appeared to be in pain. She was moaning, unresponsive to questions, and unable to assist hospital personnel with her treatment. Despite appellant's assertions that there had been a significant elapse of time and that her statements were made in response to painful medical treatments, we find Tina's behavior in the emergency room is consistent with the severity of injuries she had sustained and demonstrates that she was still dominated by the emotion, excitement, fear, or pain of the events at the time she made the statements. *See Jones,* 772 S.W.2d at 555 (stating that even in passage of time, statements are admissible if declarant was in grip of emotion, excitement, fear, or pain of event).

Appellant cites the proposition in *Kipp v. State* that "[w]hile one who is subjected to a sexual assault will undoubtedly experience a great deal of stress and emotional pain as a result thereof, we cannot say that one's statements thereafter in connection with such experience amount to 'excited utterances' under Rule 803(2)." *Kipp v. State,* 876 S.W.2d 330, 338 n. 13 (Tex.Crim.App.1994). *Kipp* is distinguishable. It involved a conviction for indecency with a six-year-old child who spoke about what "her daddy" had done to her while reenacting the events with a doll. *Id.* at 336. The State called the neighbor to testify at trial. *Id.* The court concluded the neighbor's testimony did not reflect the emotional state of the child or indicate that the child was still dominated by the emotions, excitement, fear, or pain of the event at the time she made the statement. *Id.* at 338 n. 13. We do not find *Kipp* controlling in this case. Instead, we find Tina was in the grip of the

emotion, excitement, fear, and pain of the events that took place between the time appellant left the parking lot of the bar with Tina and when Deputy Kitchen pulled appellant over. We conclude the trial court did not err in admitting Tina's statements as excited utterances.

Appellant argues the trial court's error is constitutional, requiring this court to find beyond a reasonable doubt that the error did not contribute to the conviction. Tex.R.App. P. 44.2(a). Appellant's assertion is incorrect. The admission of inadmissible hearsay constitutes non-constitutional error and is considered harmless if the appellate court, after examining the record as a whole, is reasonably assured that the error did not influence the jury verdict or had but a slight effect. Tex.R.App. P. 44.2(b); *Thomas v. State,* 1 S.W.3d 138, 142 (Tex.App. – Texarkana 1999, pet. filed) (citing *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998)). A review of the record establishes that, without Tina's statements, the evidence is otherwise sufficient to prove appellant kidnapped, sexually assaulted, and inflicted the injury that caused her death. Therefore, we find that even if the trial court erred in admitting Tina's statements, any such error was harmless because it did not influence the jury verdict or had but a slight effect. Appellant's fourteenth and fifteenth issues are overruled.[7]

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[7] At trial, the State argued Tina's statements were admissible under the medical treatment and excited utterance exceptions. Because we find that Tina's statements were admissible as excited utterances, we need not address whether her statements were admissible under the medical treatment exception.

X. VOIR DIRE

In his sixteenth and seventeenth issues, appellant asserts the trial court erred in denying his motion to reopen voir dire after an eight-week break between jury selection and opening statements. Appellant argues he was denied his federal and state constitutional rights to effective assistance of counsel because his trial attorneys were unable to intelligently make challenges for cause and exercise his remaining peremptory challenge.

The trial court may impose reasonable restrictions on the exercise of voir dire examination. *Ford v. State,* 14 S.W.3d 382, 390 (Tex.App. – Houston [14th Dist.] 2000, no pet.). We review the trial court's decision to limit voir dire under an abuse of discretion standard. *Id.* The trial court abuses its discretion when it limits a proper question concerning a proper area of inquiry. *Dinkins v. State,* 894 S.W.2d 330, 345 (Tex.Crim.App.1995). "[T]he permissible areas of questioning the venire in order to exercise peremptory challenges are broad and cannot be unnecessarily limited." *Linnell v. State,* 935 S.W.2d 426, 428 (Tex.Crim.App.1996). The trial court may limit voir dire when a question commits a veniremember to a specific set of facts, the questions are duplicitous or repetitious, the venire member had already stated his position clearly and unequivocally, and the questions are not in the proper form. *Ford,* 14 S.W.3d at 390 (citing *Dinkins,* 894 S.W.2d at 345).

Jury selection occurred from July 19, 1999, to August 11, 1999. The court then recessed and trial began on October 4, 1999. Appellant had used all but one of his peremptory strikes. During the interim, this case received additional publicity because appellant was considered to

be a suspect in the disappearance of Jessica Cain, a young woman from the same area. When the trial commenced, appellant moved for voir dire to be reopened because he wanted to inquire about prejudicial media coverage and changes in the personal life experiences of jurors during the intervening weeks. The trial court denied appellant's motion and only asked if any of the jurors had served on a jury in the interim.

Appellant claims that at least one juror, Number 10, Sandra Chumbley, "apparently had been following the [Jessica] Cain investigation as she indicated during voir dire on August 4, 1999." The following exchange between juror Chumbley and appellant's trial counsel occurred during voir dire:

> A. And this happened in Clear Lake?
>
> Q. Yeah.
>
> A. Only thing I know about was the 45 South, going toward that way, where the missing girl – the one that was on the freeway, her car supposedly had stopped down or she was in a truck or something and it broke on her or something and she was missing, and another girl in Friendswood. Those are basically the only things I remember about that way – you know, going towards that way. . . .
>
> * * *
>
> Q. Yeah. And it has to do with a girl and a truck and a guy getting stopped and [a] girl in a truck?
>
> A. On 45, the freeway?

Q. Well, no, I don't think it was on the freeway; but, it's down in Clear Lake.

A. No.

* * *

Q. You're relatively sure you don't remember seeing – it was also on TV a bunch and radio when it first happened.

A. I can't recall that one.

Appellant contends the publicity linking him to Jessica Cain's disappearance could have affected that juror's ability to fairly and impartially consider the evidence in this case, thereby providing a ground for a challenge for cause or to exercise his final peremptory challenge. Although the trial court admonished jurors not to read the newspapers or watch any news coverage about this case, appellant complains the trial court did not instruct the jurors to avoid publicity about the Jessica Cain case.

Appellant filed a motion for new trial in which he asserted "[t]he Court erred in refusing to inquire whether any juror had been exposed to matters during the interlude between July 19th, 1999 (beginning of jury selection) and October 4th, 1999 (beginning of trial) that caused them to form a conclusion as to any element of the alleged offense."

Although Texas Rule of Evidence 606(b) does not permit a juror to testify as to matters occurring, or statements made, during deliberations, it does allow a juror to

testify about outside influences that affected the juror's decision. Tex.R. Evid. 606(b).[8] Media coverage about appellant constitutes an outside influence, and Rule 606(b) thus permits a juror to testify about such. An allegation of juror misconduct in a motion for new trial must be supported by a juror's affidavit showing that "outside influences" affected the jury's decision. *Hines v. State,* 3 S.W.3d 618, 623 (Tex.App. – Texarkana 1999, pet. ref'd). Appellant, however, did not attach an affidavit from any juror about the media's influence on his or her decision to convict appellant, nor did he request a hearing on this issue. Appellant, therefore, has not shown any outside influence that affected any juror's decision in this case. We find the trial court did not abuse its discretion in refusing to reopen voir dire.[9] Appellant's sixteenth and seventeenth issues are overruled.

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[8] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or the effect of anything on the juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Tex.R. Evid. 606(b).

[9] Because we have found no error in denying appellant's request to reopen voir dire, it is not necessary to determine the applicable harm analysis.

XI. IMPROPER JURY ARGUMENT

In his eighteenth and nineteenth issues, appellant claims the trial court erred in overruling his objections to the prosecutor's argument at punishment, which injected new and harmful facts into the case, and in which the prosecutor opined on appellant's guilt for an extraneous offense. The four permissible areas of jury argument are (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to the argument of opposing counsel; and (4) plea for law enforcement. *Guidry v. State,* 9 S.W.3d 133, 154 (Tex.Crim.App.1999), *cert. denied,* 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000); *Wilson,* 7 S.W.3d at 147. Not every inappropriate remark made during closing argument mandates the reversal of a conviction. *Lagrone,* 942 S.W.2d at 619. We disregard improper jury argument unless it affects the appellant's substantial rights. Tex.R.App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). We analyze the statements at issue in the context of the entire jury argument, rather than in isolated sentences. *Castillo v. State,* 939 S.W.2d 754, 761 (Tex.App. – Houston [14th Dist.] 1997, pet. ref'd); *Williams v. State,* 826 S.W.2d 783, 785-86 (Tex.App. – Houston [14th Dist.] 1992, pet. ref'd).

During punishment, T.C. testified that she had been sexually assaulted by appellant and another individual. She further testified that appellant ejaculated on her stomach. A rape examination performed on her recovered a

male fraction inconsistent with appellant's DNA. A stipulation to that effect was read to the jury:

> The State of Texas stipulates that a DNA analysis of items recovered from the "rape kit" testified to by [T.C.] revealed DNA inconsistent with [T.C.] and Jonathan Drew. Only one "male fraction DNA component" was identified.

In his closing statement, the prosecutor then argued:

> I wanted to be clear about the DNA. I think you're clear about it, and I only have a few more minutes to speak to you. What the stipulation says is this: That there was DNA analyzed that was inconsistent with both [T.C.] and Jonathan Drew, but that there was a male fraction. And if you remember Dr. Mathew's testimony, he talks about separating out the male fractions by chemicals and that the male's is more difficult. . . . So the male fraction was not identified. *Jonathan Drew's fraction was on the outside of her body.*[10]

Appellant's trial counsel objected to the above-quoted argument, and the following took place:

> MR. DEGEURIN [Appellant's counsel]: Your Honor, I object. If I was tricked by the wording he put in that stipulation, I want the intent of that stipulation stated to the jury –
>
> * * *
>
> MR. DEGEURIN: – which was he was excluded as a donor.

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[10] Emphasis added.

THE COURT: The stipulation is in evidence. Your objection is overruled. The jury has the stipulation to examine.

MR. DEGEURIN: The problem is – I didn't realize he was going to wait until the very last minute where I can't respond and then argue –

* * *

MR. DEGEURIN: You knew the intent of the stipulation, also. It was the same –

* * *

MR. OWMBY: There's no trick to it. Why did we put her on if we didn't think that Jonathan Drew did it?

MR. DEGEURIN: Objection, Your Honor. May I approach the bench?

THE COURT: Yes.

MR. OWMBY: Your Honor, I'm responding to the argument that he was tricked.

* * *

MR. DEGEURIN: I move for a mistrial, stating the personal opinion of the Prosecution, which is wrong.

MR. OWMBY: He has personally stated that I tricked him.

THE COURT: Your objection is overruled.

MR. DEGEURIN: I did not say he did or did not believe. I said he has tricked me.

THE COURT: Your motion for mistrial is denied.

Appellant's first argument on appeal is that the prosecutor's argument injected new and harmful facts that are outside the record. A complaint on appeal that does not comport with the objection lodged at trial is waived. *Santellan,* 939 S.W.2d at 171. A review of the record shows appellant waived error by not making this specific objection at trial. Appellant's trial counsel objected that he had been "tricked" by the wording of the stipulation. He did not object on the basis that the prosecutor was arguing new facts, outside the record.

Appellant also complains of the prosecutor's statement: "There's no trick to it. Why did we put her on if we didn't think that Jonathan Drew did it?" Appellant argues the prosecutor stated his personal opinion of appellant's guilt in the sexual assault of T.C. and invited the jury to speculate on additional facts of which the prosecutor had knowledge, i.e., that a DNA fraction was found outside T.C.'s body that matched appellant's DNA, which indicated appellant's guilt of the sexual assault of T.C.

The State contends the prosecutor's remark was in response to defense counsel's assertion that he had been "tricked" by the wording of the stipulation and was proper under the invited argument rule. Under the invited argument rule, the prosecutor is allowed to respond to a defensive argument that goes outside the record. *Wilson v. State,* 938 S.W.2d 57, 60 (Tex.Crim.App.1996); *Tucker v. State,* 15 S.W.3d 229, 237 (Tex.App. – Houston [14th Dist.] 2000, pet. ref'd). We agree with the State's contention. Appellant's trial counsel initially objected on the basis of his understanding of the stipulation. Argument about trial counsel's belief as to the intent of the stipulation, which was admitted into evidence, is outside the evidentiary record. However, as long as the prosecutor's argument

does not "stray beyond the scope of the invitation," such argument is proper. *Johnson v. State,* 611 S.W.2d 649, 650 (Tex.Crim.App.1981). We do not find that the prosecutor's argument went beyond the scope of appellant's objection. We overrule appellant's eighteenth and nineteenth issues.

Accordingly, we affirm the judgment of the trial court.

APPENDIX B

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
PO BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

June 26, 2002
COA#: 14-99-101232-CR
RE: Case No. 0696-02
STYLE: DREW, JONATHAN DAVID

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

JACK B ZIMMERMANN
770 SOUTH POST OAK LANE
SUITE 620
HOUSTON TX 77056